85-2049

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

Choon Young Chung, Petitioner

Versus

NANA Development Corporation

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether, sitting in diversity, the exercise by the United States District Court for the Eastern District of Virginia of *in personam* jurisdiction under the Virginia specific jurisdiction statute over a foreign corporation fatally offended Federal constitutional due process, when the foreign corporation's only contact with Virginia was knowingly to contract to supply goods in Virginia and the cause of action arose out of that transaction.

LIST OF PARTIES

Petitioner:

Choon Yong Chung
10700 Miller Road
Oakton, Virginia 22124
(703) 938-2727

Respondent:

NANA Development Corporation
4706 Harding Drive
Anchorage, Alaska 99503
(907) 248-3030

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REPORTS OF OPINIONS

The report of the United States Court of Appeals for the Fourth Circuit to which this Petition is directed is 783 F.2d 1124 (4th Cir. 1986).

The decision and order of the United States District Court for the Eastern District of Virginia is not published, but is reported in the appendix hereto.

STATEMENT OF JURISDICTION

The Court of Appeals for the Fourth Circuit made its decision on February 19, 1986. Judgement was entered on the same day.

The United States Supreme Court has jurisdiction pursuant to 28 U.S.C. 1254(1) and Supreme Court Rule 17.1.(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment 14, Section 1, to the

United States Constitution:

> "Nor shall any State deprive any person of . . . liberty, or property, without due process of law. . . ."

Virginia Code. Section 8.01-328.1. (1984), which is reproduced in the appendix hereto.

STATEMENT OF FACTS

From his home in Virginia, Chung initiated telephone negotiations with NANA, in Alaska, for the purchase of frozen reindeer antlers, and, after conversations between Chung, in Virginia, NANA in Alaska, and NANA's joint venturer, John Wang, in San Francisco, a verbal contract for the purchase of 500 pounds of frozen antlers at $35.00 per pound was made by telephone. (Joint Appendix before the Court of Appeals, hereinafter "JA", 25 and 43-46).

When Chung arrived in Alaska to take delivery of the 500 pounds, NANA could deliver only 120 pounds. JA 20. A new verbal contract was thereupon made, whereunder NANA voluntarily undertook to air-express the remaining 380 pounds to Chung in Virginia, JA 50-51, and Chung paid NANA $17,500. JA 21. NANA shipped 378 pounds consigned to Chung in Virginia, but failed to insure the shipment, and marked the air bill "no declared value". JA 21,24,42. During shipment, the 378 pounds was not kept in frozen condition and upon arrival in Virginia was spoiled and unusable for any purpose. JA 21-22.

Chung brought suit against NANA in the United States District Court in which he resides on the basis of diversity of citizenship pursuant to 28 U.S.C. 1332(a) (1981). NANA moved to dismiss the complaint for want of jurisdiction. The

District Court denied NANA's motion on the basis that it had contracted to supply services or things in Virginia, that the cause of action arose out of the contract, and that to assert personal jurisdiction did not offend due process. Upon trial, the District Court found for Chung and awarded him a judgment of $8,207.00 plus legal interest.

NANA appealed the denial of its motion to dismiss to the Court of Appeals for the Fourth Circuit, which, by a divided panel, reversed the District Court on the basis that the connection presented between NANA and Virginia was not sufficient to support personal jurisdiction under the due process rules enunciated by this Court. It remanded the case to enable Chung to move to transfer the case to a U. S. District Court in which it could be brought (Alaska).

ARGUMENT

> "[J]urisdictional rules may not be employed in such a way as to make litigation 'so gravely difficult and inconvenient' that a party unfairly is at a 'severe disadvantage' in comparison to his opponent." Burger King Corp. v. Rudzewicz, U.S. , 105 S.Ct. 2174, 2185 (1985).

The Court of Appeals has in this instance held a fact situation clearly within the plain intendment of Virginia's single-act long-arm statute not to possess the minimal contacts requisite to federal constitutional due process and has thus, in effect, declared that state statute to be unconstitutional under the facts of this case. Its holding raises the question of whether, for personal jurisdiction, a less rigorous test of minimum contacts should be required in "specific jurisdiction" situations as contrasted to "general jurisdiction" situations -- a question which has not

yet been, but should be, settled by this Court. Its holding also conflicts with applicable decisions of this Court.

I. ALTHOUGH THIS COURT HAS ESTABLISHED THE PRINCIPLE THAT GENERAL JURISDICTION SITUATIONS REQUIRE A GREATER QUANTUM OF CONTACTS TO ESTABLISH PERSONAL JURISDICTION, IT HAS NOT YET ESTABLISHED THE OBVERSE FOR SPECIFIC JURISDICTION SITUATIONS

This Court has characterized the test to be applied in "general jurisdiction" situations, i.e., when a plaintiff's claim does not arise out of the defendant's activities in the forum State, as whether the contacts are of a "continuous and systematic" nature. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 412 (1984). The Helicopteros holding had its roots in Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952), where the Court held, in a non-arising-out-of situation,

that the exercise of personal jurisdiction over the defendant corporation comported with the teaching of International Shoe because the corporation "had been carrying on in [the forum State] a continuous and systematic . . . part of its general business". Perkins, 342 U.S. at 438. The Fourth Circuit itself recognized and applied this principle when in Wolf v. Richmond City Hospital Authority, 745 F.2d 904 (4th Cir. 1984), it said:

> "The Supreme Court has characterized the test to be applied when a plaintiff's claim does not arise out of a defendant's activities in the forum State as whether the contacts are of a 'continuous and systematic' nature." Id. at 909.

The logical obverse -- a quantitative or qualitative test of minimal contacts requisite to sustain personal jurisdiction in specific jurisdiction situations -- has not, however, been settled by this Court.

To be sure, the Court approached the question in Helicopteros when it said that "[w]hen a controversy is related to or 'arises out of' a defendant's contacts with the forum, the Court has said that "the 'relationship among the defendant, the forum, and the litigation' is the essential foundation of in personam jurisdiction". Citing Shaffer v. Heitner, 433 U. S. 186, 204 (1977). Also, arising-out-of situations are frequently single-act situations -- such as the instant case -- of which this Court has said "even a single act can support jurisdiction" if the act has a "substantial connection" with the forum. Burger King, supra, 105 S.Ct. at 2184, n.18, citing McGee v. International Life Insurance Co., 355 U.S. 220,223 (1957).

These expressions suggest that the court intends a less rigorous standard than "continuous and systematic" contacts

to support personal jurisdiction in single-act, specific jurisdiction situations. Virtually all states have now enacted single-act long-arm statutes. In many instances, including that of Virginia,1/ the states intend to assert jurisdiction to the full extent permitted by due process, because --

> "A trend is clearly discernable toward expanding the permissible scope of state jurisdiction over foreign corporations . . .. In part this is attributable to the fundamental transformation of our national national economy over the years. Today, many commercial transactions touch two or more states and may involve parties separated by the full continent . . .. At the same time, modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity. McGee v. International Life Insurance Co., supra, at 222-223.

In the nearly 30 years since those words were written, the transformation of

1/ See Kolbe, Inc. v. Chromodern Chair Co., 211 Va. 736, 740, 180 S.E.2d 664, 667 (1971).

the national economy has accelerated. However, the evolution of the trend and its manifest legal utility is greatly impeded when a court of appeals, as did here the Fourth Circuit, applies the rigorous general jurisdiction test to a specific jurisdiction situation. The instant case offers the occasion to clarify and guide the application of due process considerations to specific jurisdiction situations.

II. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

The Court of Appeals has erred in applying the "continuous and systematic" contacts test to a single act situation, as error which surely should be rectified by the Court. Moreover, even if this rigorous test is applicable, the Fourth Circuit has misapplied it.

A. The Appeals Court Has Erroneously Applied the General Jurisdiction Test to A Specific Jurisdiction Situation

The Fourth Circuit states as the principal part of the law applicable to this case:

> "For a defendant to be subject to suit in a forum where it is not physically present, due process demands certain 'minumum contacts' with the forum such 'as make it reasonable . . . to require to corporation to defend the particular suit which is brought there." [citing] International Shoe, 326 U.S. at 316-317. Ordinarily these contacts should be 'continuous and systematic,' as opposed to casual . . . single or isolated,' id. at 317, a requirement springing from the essential principle 'that there be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.' [citing] Hanson [v. Denckla], 357 U.S. [235], 253 [(1958)]." Chung v. NANA, 783 F.2d at 1127. Emphasis added.

By so doing, the Court of Appeals established as the test applicable to this single-act, specific-jurisdiction

situation the very same test which it in Wolf v. Richmond, supra, had said was reserved to general jurisdiction situations. Although, its erroneous statement of the test is obscured by the fact that the majority recites in the applicable law section of its opinion quotations from virtually the full panoply of this Court's decisions on due process constraints on the exercise by states of personal jurisdiction, the majority, in the words of dissenting Judge Ervin, "erred in its failure to note [the] distinction [between general and specific jurisdiction], and in its implicit application of the 'continuous and systematic' test for general jurisdiction to the contacts required in this case." Id. at 1130.

A further manifestation of the its misapplication of this Court's decisions is the Appeals Court's statement: "NANA

has simply not sent its goods into the stream of interstate commmerce with the minimal regularity due process demands". Id. at 1129. Emphasis added. How, in single-act situations, can goods be sent into the stream of commerce with "regularity"? It cannot be. The effect of erroneously holding that single-act situations are subject to the continuous and systematic contacts test is to nullify the various single-act long-arm statutes. This Court ought not to permit such incorrect applications at the appellate level to stand uncorrected, for the mischief can only be compounded with time.

B. The Court Below Has Misinterpreted And Misapplied The Relevant Decisions Of This Court

In denying jurisdiction, the Appeals Court relied heavily on its conclusion

that NANA's shipping its goods into Virginia was an "isolated" or "attenuated" single transaction. "Isolated" means standing alone, and "attenuated" refers to this Court's use of that term in Burger King, 105 S.Ct. at 2186, and comes from the Latin attenuare meaning to make thin or, more modernly, to lessen in amount, force, or value. Elsewhere mentioned by the Appeals Court, Chung v. NANA, supra, at 1128, are the words "random" and "fortuitous", which this Court used in the same place and context. 2/

The defendant voluntarily contracted to ship its goods into Virginia with full

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2/ "This 'purposeful availment' ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random', 'fortuitous', or 'attenuated' contacts . . .. [citing] Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984) and World-Wide Volkswagen Corp. v. Woodson, 444 U.S. at 299." Burger King Corp. v. Rudzewicz, 105 S.Ct. at 2183.

knowledge that they were intended for consumption in Virginia. That single act was not "random" in that it was wholly predictable that if, for example, NANA had negligently allowed the reindeer horns to become contaminated with a toxic substance and consumers in Virginia had thereby been poisoned, that it most certainly could expect to be haled into court in that State. There should be no distinction betwen tort and contract actions in this sense, since the Virginia single-act long-arm statute encompasses both classes of action. The shipment into Virginia was not "fortuitous", but the result of an affirmative, voluntary, deliberate decision by NANA. The shipment was not "attenuated" since it did not wander haphazardly through various states without initial destination (as might an automobile) and ultimately find its way by chance into Virginia.

This fact well distinguishes the instant situation from the "foreseeability" which this court found inadequate in Volkswagen. There the automobile had been sold in New York to residents of New York and only later, fortuitously, wound up in Oklahoma -- an event of very low predictability. Here, it was 100 percent predictable, barring a crash of the airplane, that the goods would go to Virginia.

The Court of Appeals also cited as an important factor in its denial of jurisdiction the "unilateral" character of Chung's dealings with NANA: that Chung initiated the negotiations, that "NANA merely responded to Chung's inquiries", and that NANA shipped the goods to Virginia merely for the convenience of Chung. This, the court said, was fatal to jurisdiction because "unilateral activity of another party or a third

person is not an appropriate consideration", quoting Helicopteros, 466 U.S. at 414. The court seems to have had the impression that the big corporation NANA was merely doing small businessman Chung a favor by selling to him and ought not be taken to account for its kindness. In this the majority misapprehended the business relationship betwen Chung and NANA. It takes two to dance the buyer-seller tango. NANA was selling to Chung at a price considerably above its price to other customers; it was interested in making the sale, not as an accomodation to Chung, but in order to realize the enhanced profit on the sale. All of the actions of both parties were bilateral, not unilateral, and NANA purposefully undertook to make the shipment to Virginia for gain. Thus, the unilateral action factor of Helicopteros was not correctly applied.

The Appeals Court also relied heavily on Burger King, stating that "the [Supreme] Court has expressly denied that an individual's contract with an out-of-state party can alone automatically establish sufficient minimum contacts . . .. It is essential that the contact relied upon have a 'substantial connection' with the forum state . . .. The factors considered in determining whether the defendant purposefully established minimum contacts with the forum include 'prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing." [Source citations omitted] Chung v. NANA, 783 F.2d at 1128-29. Cited as adequate contacts in Burger King were a written contract contemplating a "structured 20-year relationship that envisioned continuing and wide-reaching contacts", frequent

communication, and a choice-of-law provision.

The court below thus equated the instant case with the Burger King situation. But, in the words of Justice Stevens, dissenting in Burger King, defendant Rudzewicz "did not prepare his french fries, shakes, and hamburgers in Michigan, and then deliver them into the stream of commerce 'with the expectation that they would be purchased by consumers in' Florida". Id. at 2201. In the present case, however, NANA did prepare its reindeer horns in Alaska and deliver them into the stream of commerce with the expectation that they would be purchased by consumers im Virginia, within the teaching of Volkswagen. The Fourth Circuit's equating the Chung facts with the Burger King situation was thus a misapplication of this Court's decisions.

Finally, the court below failed to

give any attention at all to certain considerations which this Court has said "sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required" -- such considerations as "the burden on the defendant" versus "the plaintiff's interest in obtaining convenient and effective relief", and "the State's interest in obtaining the most efficient resolution of controversies". Burger King, 105 S.Ct. at 2184-85.

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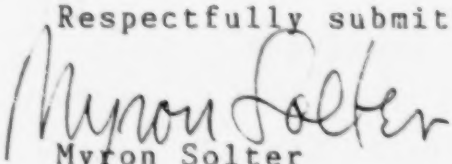
From the foregoing, it is evident that the majority failed to heed this Court's admonition against employing jurisdictional rules in such a way as to place this plaintiff at a severe disadvantage. The Court should therefore grant certiorari.

Respectfully submitted,



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APPENDIX

1. Opinion Of United States Court Of Appeals For The Fourth Circuit

No. 84-2273

Choon Young Chung,

Appellee,

versus

NANA Development Corporation,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. James C. Cacheris, District Judge. (C/A 84-50-A).

Argued: June 6, 1985
Decided: February 19, 1986

Before SPROUSE, ERVIN, and WILKINSON, Circuit Judges

Richard Anthony Baenen (Patricia A. Gotschalk; Wilkinson, Barker, Knauer & Quinn on brief) for Appellant; Myron Solter for Appellee.

WILKINSON, Circuit Judge:

The issue on appeal is whether an Alaska corporation, defendant NANA Development Corp., is subject to the personal jurisdiction of a federal district court sitting in diversity in Virginia, based upon a single sale in Alaska of reindeer antlers to plaintiff Choon Young Chung, where part of the purchase was subsequently shipped by common carrier to plaintiff in Virginia. The district court found personal jurisdiction to exist under the Virginia long-arm statute, VA. Code Sec. 8.01-328.1(A)(2)(1984). We hold that the "minimum contacts" between NANA and Virginia required by International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) are lacking. Therefore, exercise of jurisdiction over defendant in Virginia is barred by Fourteenth

Amendment due process.

I

NANA Development Corp. is an Alaska corporation, with its principal place of business in Anchorage. It is engaged in selling frozen reindeer antlers, which after processing are sent to the Orient for medicinal purposes.1/ NANA has never solicited any business in Virginia.

Chung, a Virginia resident, initiated dealings with NANA in May, 1982. telephoning NANA's Alaska offices to inquire about the possibility of

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1/ NANA operates a range of two million acres in Alaska, with a herd of some 5,000 reindeer. The reindeer are rounded up annually, using helicopters, and their horns clipped. By the next year, the antlers regrow, After clipping the horn is frozen, as it contains blood and is perishable, spoiling quickly if thawed.

The antlers, following processing, are sold in various Asian countries, where they are used as a tonic for "promoting strengths of body in particularly weak people," according to plaintiff. Evidently reindeer antler is believed to have aphrodisiac properties.

purchasing reindeer antlers. After several conversations between Chung, NANA officials in Alaska, and NANA's joint venturer in San Francisco, John Wang, Chung was told by John Schaeffer of NANA that he could buy 500 pounds of antlers at $35.00 per pound after the June roundup, but would have to take delivery in Nome, Alaska. Chung agreed to these terms.

On June 9, 1982, Chung travelled to Alaska, where he met with NANA officials and watched the reindeer roundup. While in Alaska, Chung purchased 500 pounds of reindeer antlers on June 14. The total price was $17,500, at the spot market price of $35.00, and the transaction was evidenced in writing by a NANA invoice. Payment was made at the time of sale by a cashier's check for $12,000 and a personal check for $5,500.

The parties originally contemplated that the entire order of 500 pounds of antlers would be delivered to Chung at the Nome airport. When Chung was ready to depart on June 14, however, only 120 pounds of antlers were ready for him at the airport. Chung could not wait for the delayed 380 pounds to be delivered to him personally in Nome, as his flight was leaving shortly, and Schaeffer thereupon agreed to ship the remainder of the antlers by air to Chung in Virginia within 24 hours. Chung left Alaska with the available 120 pounds of antlers. On June 15, NANA consigned to an air carrier three boxes of "frozen reindeer horns," weighing 378 pounds, freight charges collect to Chung in Washington, D.C. The boxes and air bill were marked with the instruction "keep frozen." No insurance was obtained or value declared on the shipment of antlers.

Chung received notice on June 18 that the shipment had arrived at National Airport in Arlington, Virginia. He promptly went to the airport, where he dicovered that the boxes were leaking blood and emitting a "terrible" odor, The antlers had thawed in transit, becoming spoiled and unusable. Chung complained to the carrier, and promptly notified NANA of his loss. Because the shipment was uninsured and had no declared value, however, the carrier offered only the minimum reimbursement of $.50 per pound, or $190. Chung stopped payment on his $5,500 personal check to NANA, and brought this suit to recover the balance of his loss.

The district court, finding personal jurisdiction over NANA in Virginia, determined after a bench trial that NANA had breached its duty to insure the shipment of antlers. Damages were

awarded to Chung of $8,207. NANA appeals solely on the question of personal jurisdiction.

II

The connection here presented between NANA and Virginia was not sufficiently substantial to permit the exercise of personal jurisdiction, consistent with the "traditional conception of fair play and substantial justice" embodied in due process. International Shoe, 326 U.S. at 320. Rather, we view this contact as not more than the "isolated" or "attenuated" single transaction which has always been deemed inadequate to satisfy due process. See Burger King Corp. v. Rudzewicz, U.S. , 105 S.Ct. 2174, 2184 n.18 (1985); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 299 (1980), International Shoe, 326 U.S. at 318. The expansion of interstate commerce, while including acceptance of flexible due

process standards, has hardly dictated the abandonment of all limits on personal jurisdiction. World-Wide Volkswagen, 444 U.S. at 294; Hanson v. Denckla, 357 U.S. 235, 250-51 (1958). Certain Supreme Court decisions have suggested that these jurisdictional restrictions are based upon federalism, see e.g. World-Wide Volkswagen, 444 U.S. at 294, but more recent opinions establish that due process is concerned with a fundamental individual liberty interest. Burger King, 105 S.Ct. at 2181-82 & n.13; Insurance Corp. v. Compagnie des Bauxites, 456 U.S. 694, 702-03 & n.10 (1982). A defendant is protected by due process against being bound in personam by judgments of a forum with which he lacks meaningful relations. Burger King, 105 S.Ct. at 2181-82; International Shoe, 326 U.S. at 319. In this case, the only link offered between defendant and the

forum state is so unique and unsolicited that to sustain jurisdiction would inevitably trench upon the personal liberty the Constitution safeguards.2/

2/ Preliminarily, in this diversity action, we must consider whether state law authorizes the exercise of jurisdiction. Wolf v. Richmond County Hospital Authority, 745 F.2d 904, 909 (4th Cir. 1984); Hardy v. Pioneer Parachute Co., 531 F.2d 193, 195 (4th Cir. 1976); Bowman v. Kurt G. Joa, Inc., 561 F.2d 706, 711 (4th Cir. 1966). Defendant was found subject to personal jurisdiction under the provision of the Virginia long-arm statute governing any person "[c]ontracting to supply services or things in this Commonwealth." Va. Code Sec. 8.01-328.1(A)(2). We are unaware of any federal of state decision giving a restrictive interpretation to this language, cf. Elefteriou v. Tanker Archontissa, 443 F.2d 185 (4th Cir. 1971), while the Virginia long-arm statute has been repeatedly construed to assert jurisdiction to the extent due process permits. Brown v. American Broadcasting Co., 704 F.2d 1296, 1301 (4th Cir. 1983); Peanut Corp. v. Hollywood Brands, Inc., 696 F.2d 311, 313 (4th Cir. 1982). See also Kolbe Inc. v. Chromodern Chair Co., 211 Va. 736, 740, 180 S.E.2d 664, 667 (1971); Carmichael v. Snyder, 208 Va. 451, 456, 164 S.E.2d 703, 707 (1968) (decisions under prior statute). Thus the state law and due process analyses are identical.

Plaintiff also relies upon several other provisions of the long-arm statute, not discussed by the district court. See

For a defendant to be subject to suit in a forum in which he is not physically present, due process demands certain "minimum contacts" with the forum such "as make it reasonable . . . to require the corporation to defend the particular suit which is brought there." International Shoe, 326 U.S. at 316-17. Ordinarily these contacts should be "continuous and systematic" as opposed to "casual . . . single or isolated," id. at 317, a requirement springing from the essential principle "that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and the protections of its laws." Hanson, 357 U.S. at 253.

Va. Code Sec. 8.01-328.1(A) (1), (4), (5). Even if these were applicable, a matter on which we need express no opinion, the limitations imposed by due process would remain unchanged.

The significant contacts considered are those actually generated by the defendant. It is firmly established that "[t]he unilateral activitity of those who claim some relationship with a non-resident defendant cannot satisfy the requirment of contact with the forum State." Id. See also World-Wide Volkswagen, 444 U.S. at 298. Jurisdistion may not be manufactured by the conduct of others. Rather, "the defendant's conduct and connection with the forum State [must be] . . . such that he would reasonably anticipate being haled into court there." World-Wide Volkswagen, 444 U.S. at 297. Absent foreseeability of this sort, derived from purposeful contacts, it is irrelevant that a defendant could foresee the likehood that its product would arrive in the forum state." Id.

The focus on a defendant's own acts serves the underlying due process objective of fair notice, giving "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will or will not render them liable to suit." Id. Thus, a corporation may be subject to jurisdiction when it "delivers its products into the stream of commmerce with the expectation that they will be purchased by consumers in the forum State." Id. at 298. But where contacts are of an "isolated" nature, the "reasonable foreseeability of litigation in the forum is substantially diminished." Burger King, 105 S.Ct. 2184, n.18. See also id. at 2189. Unique or insignificant relations with the forum suggest an absence of purposefulness, leading to the conclusion that subjecting

the defendant to personal jurisdiction would be fundamentally unfair.

The contact between NANA and Virginia in this case was hardly so purposeful that litigation in Virginia could have been reasonably foreseen. NANA's ties with Virginia were virtually non-existent; entirely so, apart from this single transaction. Although it is true that a single contractual relationship may furnish a basis for jurisdiction, Burger King, 105 S.Ct. at 2184, n.18; McGee v. International Life Insurance Co., 355 S.Ct. at 220, 223 (1957), the Court has expressly denied that an individual's contract with an out-of-state party can alone automatically establish sufficient minimum contacts. Burger King, 105 S.Ct. at 2185. It is essential that the contract relied upon have a "substantial connection with the forum state. McGee,

355 U.S. at 223. The factors considered in determining whether the defendant purposefully established minimum contacts with the forum include "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing." Burger King, 105 S.Ct. at 2186. In undertaking the minimum contacts analysis, it must be borne in mind that "unilateral activity of another party or a third person is not an appropriate consideration." Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 104 S.Ct. 1868, 1873 (1984)

The attenuated contact here distinctly contrasts with the more "substantial and continuing relationship" described in Burger King. 105 S.Ct. at 2190. There, the Court found personal jurisdiction over a Michigan franchisee in the franchisor's home state, Florida. The

defendant franchisee initiated dealings with the plaintiff Florida corporation to obtain the desired franchise, and "entered into a carefully structured 20-year relationship that envisioned continuing and wide-reaching contacts." Id. at 2186. Frequent communications passed between the franchisee in Michigan and the franchisor's Florida headquarters. Id. at 2187. Moreover, the franchise documents provided that all disputes would be governed by Florida law, giving the defendant fair notice that he might be subject to suit in Florida. Id. at 2187, 2190. Similarly, in McGee, the contacts were of a less transient nature. The life insurance contract in question remained in force over a period of several years, was delivered in the forum state, and the premiums were mailed from there. 355 U.S. 221-23.

If Burger King and McGee demonstrate what is sufficient in the realm of minimum contacts, this case demonstrates what is inadequate. The contract for reindeer antlers between Chung and NANA was finalized in Alaska, and though its essential terms were negotiated by telephone between Alaska and Virginia, those communications were initiated by Chung. NANA made no purposeful effort of its own to develop a market for its product in Virginia. It merely responded to Chung's unilateral inquiries. Payment for the antlers was tendered in Alaska at the time of sale. The parties entered into no agreements for a continuing business relationship beyond this single transaction in Alaska. Nothing in the parties' contract or course of dealing put NANA on notice that it might be haled into court in Virignia. NANA appears to have done everything possible to confine

its United States business to its home state of Alaska during this transaction, and never had any other dealings with Virginia whatsoever. It only shipped goods to Virginia on this isolated occasion for the convenience of Chung, who could not remain in Alaska to take delivery there as originally contemplated by the parties.

It is immaterial, in this context, that NANA knew of the ultimate destination of the shipment, since the foreseeability of injury in a distant forum is not the touchstone of minimum contacts. Burger King, 105 S.Ct. at 2183; World-Wide Volkswagen, 444 U.S. at 295. 297. While it is only fair that a corporation seeking to create interstate business by its own endeavors be subject to suit wherever it extends its reach, as the "contacts proximately result from actions by the defendant himself," Burger

King, 105 S.Ct. 2184 (emphasis in original), it is equally necessary to protect an enterprise such a NANA which has not made such efforts, but only sells its product to direct purchasers in its home state. Predictability in structuring business dealings would otherwise be impaired, and fair notice give way to the whims of purchasers, leaving jurisdiction to rest on "random, isolated, or fortuitous" circumstances. Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 104 S.Ct. 1473 (1984) NANA has simply not sent its goods into the stream of interstate commerce with the minimal regularity due process demands.

Of course, as the Court has repeatedly stressed, we do not approach the "minimum contacts" analysis with an aim to propound a talismanic or mechanical test, and we recognize that the facts and circumstances of each case are

determinative. Burger King, 105 S.Ct. at 2189; Kulko v. California Superior Court, 436 U.S. 84, 92 (1978). This circuit has previously admitted that a single shipment of goods into a forum state may sometimes establish a jurisdictional basis. See Ajax Realty Corp. v. J.F. Zook, Inc., 493 F.2d 818, 822-23 (4th Cir. 1971), cert. denied, 411 U.S. 966 1973). In other cases, such a single shipment has been held inadequate for "minimum contacts" purposes. See Erlanger Mills. Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502, 507 (4th Cir. 1956). Reasonableness and fairness are concepts inherently incapable of more precise definition, and, particularly in this area, "the shades are innumerable." Kulko, 436 U.S. at 92, quoting Estin v. Estin, 2334 U.S. 541, 545 (1948). Examining with care all of the facts and cicumstances here presented, we are not

persuaded that it would be just to subject NANA to the jurisdiction of courts in Virginia, where its connections are not sufficiently purposeful but of an isolated and unsolicited character.

We are not dissuaded from this view by the district court's determination that NANA's failure to insure the reindeer antlers rendered it the party at fault. Personal jurisdiction is not to be determined by a peek at the merits, but established on independent grounds. While in this instance, due process may appear to protect a breaching defendant from suit in an injured plaintiff's state, in others it will safeguard defendants from baseless litigation in remote and unrelated forums. Courts have come to seek fairness in these fact-bound situations by requiring some modicum of purposeful contact with the forum involved.

We must also decline the dissent's invitation to chop NANA's course of conduct into small bits and fragments in an attempt to connect some single fragment with the breach. The fairness to a party demanded by due process requires here that we view NANA's activities in their entirety -- activities which, apart from a single chance happening in an Alaska airport, show no actual or desired connection with Virginia, the forum state.3/

3/ The dissent suggests that we have used the wrong standard in determining whether NANA's contacts with Virginia were sufficient. The dissent says that "NANA need only have 'fair warning that a particular activity may subject [it] to the jurisdiction of a foreign sovereign'." (post, p 16), and that "'Fair warning' exists when a defendant has 'purposefully directed' his activities at residents of the forum'." (post, p 16).

We have said that "'the defendant's conduct and connection with the forum, state [must be] . . . such that he should reasonably anticipate being haled into court there,'" (supra, p 7), and that "The conduct between NANA and Virginia in

If a party's slightest gesture of accomodation were to impose personal jurisdiction, commercial dealings would soon turn unobliging and brusque. The dissent's suggestions that NANA refuse to ship the horn to Virginia or insist that Chung remain in Alaska or appoint an agent in Nome to take delivery all involve inconvenience to Chung. Concepts of in personam jurisdiction should not be structured to manufacture minimum contacts from every amenable act.

Because personal jurisdiction here fails the threshold test of "minimum contacts," we need not separately consider the convenience of any particular forum to the respective parties, although we note that it would seem equally burdensome for NANA to

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this case was hardly so purposeful that litigation in Virginia could have been reasonably foreseen." (supra, p 8). We see no meaningful distinction between the two formulations.

defend in Virginia as for Chung to sue in Alaska. Factors such a burden on the defendant, the plaintiff's interest in obtaining effective relief, and the forum state's concern with adjudicating the dispute are generally addressed only after "it has been decided that a defendant purposefully established minimum contacts with the forum state," Burger King, 105 S.Ct. at 2184, although sometimes bearin on overall reasonableness. Id. See also World-Wide Volkswagen, 444 U.S. at 292. Due process mandates at the outset some deliberate effort by the defendant to do business in the forum state, "thus invoking the benefits and protections of its laws." Hanson, 357 U.S. at 253. If a single unsolicited sale of reindeer antler to a Virginia resident in Alaska were held to constitute "minimum contacts," little would remain of the safeguard of personal

liberty from jurisdictional abuse the due process clause affords.

Accordingly, the judgment of the district court sustaining personal jurisdiction is reversed. This case is remanded to afford Chung an opportunity to move for transfer of the case to a district court where it could have been brought. See 28 U.S.C. Sec. 1406(a); Goldlawr, Inc. v. Heiman, 369 U.S. 463 (1962); O'Neal v. Hicks Brokerage Co., 537 F.2d 1266, 1268 (4th Cir. 1976).

REVERSED AND REMANDED

ERVIN, Circuit Judge, dissenting:

In my opinion, the contacts in this case are sufficient to establish personal jurisdicition over a cause of action that "arise[s] out of or relate[s] to" these contacts. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. , 104 S.Ct. 1868, 1872 (1984). NANA purpose-

fully entered into an agreement to ship its product into Virginia, and it profited from that shipment. Furthermore, it could have foreseen and easily taken steps to avoid this lawsuit. I therefore believe that NANA's contacts with Virginia meet the minimal requirements for a constitutional assertion of personal jurisdiction. Accordingly, I respectfully dissent.

I.

Contacts which are insufficient to establish general jurisdiction over an out-of-state defendant may be sufficient to establish specific jurisdiction over him.1/ Wolf v. Richmond County Hospital

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1/ "General jurisdiction" is the exercise of personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum. Helicopteros, 104 S.Ct. at 1872 n.9. "Specific jurisdiction" is the exercise of personal jurisdiction over a defendant in a suit that does arise out of or relate to the defendant's contacts with the forum. Id. at 1872 n.8.

Authority, 745 F.2d. 904, 909 (4th Cir. 1984), cert. denied, 106 S.Ct. 83 (1985); see also Helicopteros, 104 S.Ct. at 1872, 1874 & n.12. The instant case, unlike many of those in which jurisdiction has been denied, see e.g., Helicopteros, 104 C.St. 1868; World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Wolf, 745 F.2d 904, involves an exercise in specific jurisdiction. The majority erred in its failure to note this distinction, and in its implicit application of the "continuous and systematic" test for general jurisdiction to the contacts required in this case.

In order for specific personal jurisdiction to be constitutional, NANA's contacts do not have to rise to the "continuous and systematic level" required for general jurisdiction. Helicopteros, 104 S.Ct. at 1873. Rather,

NANA need only have "'fair warning that a particular activity may subject [it] to the jurisdiction of a foreign sovereign'." Burger King Corp. v. Rudzewicz, U.S. , 105 S.Ct. 2174, 2182 (1985) (quoting Shaffer v. Heitner, 433 U.S. 186, 218 (1977)(Stevens, J., concurring in judgment)). "Fair warning" exists when a defendant has "purposefully directed" his activities at residents of the forum," id. (quoting Keeton v. Hustler Magazine, 465 U.S. 770, 774 (1984)), and the litigation results from injuries arising out of those activities. Id. The latter requirement is obviously met in this lawsuit. The facts, properly construed, demonstrate that NANA's contacts also meet the "purposeful direction" requirement.

II.

In its portrayal of NANA's contacts with Virginia as constitutionally inade-

quate, the majority misinterprets the situation surrounding the spoiled Virginia shipment. Chung did initially contact NANA and fly to Alaska to pick up the horn personally. If all had gone as planned, NANA would have followed its regular delivery practice and avoided its frequent problems of spoiled horn and inadequate insurance. See Deposition of John W. Schaeffer, President of NANA Corporation, Joint Appendix at 33 (Sept. 8, 1984) (delivery practice designed to limit NANA's responsibility for spoiled shipments). Under its regular delivery scheme, NANA's contacts with Virginia would arguably have been not more than "'fortuitous'" and therefore insufficient to support an assertion of jurisdiction. See Majority Opinion, supra at 11.

When Chung was preparing to leave Alaska, however, the situation changed. Chung, who had paid in full for 500

pounds of horn, expected delivery in full at the Nome Airport on June 14, 1982. NANA, however, was unable to meet its obligation and deliver on time. NANA then abandoned its regular delivery practice and voluntarily entered into a new agreement with Chung. Under this second agreement, NANA took responsibility for the safe arrival of 380 pounds of horn in Virginia.

This is not a case in which the 380 pounds of horn ended up in Virginia because of Chung's unilateral activity. Cf. World-Wide Volkswagen, 444 U.S. at 295-99. In making the second agreement, NANA knowingly and purposefully availed itself of the privilege of shipping its product to a Virginian in Virginia. The Supreme Court recently stated that "even a single act can support jurisdiction" if the act has a "'substantial connection'" with the forum. Burger King, 105 S.Ct. at

2184 n.18 (quoting McGee v. International Life Insurance Co., 355 U.S. 220, 223 (1957)). It is difficult to understand how a conscious decision to change an existing agreement and to alter a company's routine by shipping a specific batch of horn to a particular individual located in Virginia is not substantially connected with Virginia. Cf. McGee v. International Life Insurance Co., 355 U.S. 220 (1957) (Texas corporation's reinsurance of one individual in California, through the assumption of the obligations of an Arizona corporation, was sufficient connection for the exercise of specific personal jurisdiction in California).

Contrary to the majority, I also believe that this litigation meets World-Wide Volkswagen's "foreseeability" test for minimum contacts. See World-Wide Volkswagen, 444 U.S. at 296-97. Testimony

from NANA's President indicates an awareness of and previous experience with the specific problems that arose in this case. See Deposition of John W. Schaeffer, supra, p. 17. NANA purposefully directed its activity toward Virginia and should have "reasonably anticipate[d] being haled into court there." World-Wide Volkswagen, 444 U.S. at 297. Furthermore, this case meets the Supreme Court's requirement that the defendant be able to alleviate the risk of litigating in an out-of-state forum. See id. NANA could simply have insured the package and thereby covered the loss. Alternatively, it could have refused to ship the horn to Virginia and refunded Chung's payment for 380 pounds. It could have insisted that Chung remain in Alaska to collect the horn or appoint an agent in Nome to take delivery and shipment responsibility for him. Given these op-

tions, the majority's assertion, supra at 10, that "NANA appears to have done everything possible to confine its United States business to its home state of Alaska during this transaction" is plainly inaccurate.

In its second agreement with Chung, NANA abandoned its usual policies and willingly shipped its product into Virginia. In doing so, it purposefully directed its activity to Virginia, thereby meeting the minimum contacts requirement for Virginia's assertion of specific personal jurisdiction.

III.

Once minimum contacts are established, this court must consider whether an assertion of personal jurisdiction comports with "'fair play and substantial justice.'" Burger King, 105 S.Ct. at 2184 (quoting) International Shoe v. Washington, 326 U.S. 310, 320 (1945)).

Some of the factors appropriately considered in this analysis are Virginia's interest in adjudicating this dispute and Chung's interest in obtaining convenient and effective relief. Id. Virginia's interest lies both in ensuring that the products supplied to its citizens are not worthless and in "providing effective means of redress for its residents." McGee, 355 U.S. at 223. Chung's interest in litigating in his home state is obvious. Given these factors, assertion of personal jurisdiction in Virginia seems appropriate.

One factor, the burden on NANA of defending in Virginia, does tend to undermine the assertion of jurisdiction. See Burger King, 105 S.Ct. as 2184. A defendant who has purposefully directed his activities toward Virginia, however, "must present a compelling case" in order

to escape personal jurisdiction. Id. at 2185. Mere claims of distance and inconvenience are properly handled in the a motion for a change of venue, not a denial of personal jurisdiction. Id. In fact, the Supreme Court has required defendants to travel from Texas to California, see McGee, 355 U.S. at 224, and from Michigan to Florida, see Burger King, 105 S.Ct. at 2188, to defend. The similar, although slightly more severe, complaints of distance in this case simply do not rise to the level of unconstitutional burdensomeness. NANA's aargument is not sufficiently compelling to make an otherwise appropriate assertion of personal jurisdiction unconstituional.

As the foregoing discussion illustrates, NANA purposefully directed its actions toward Virginia, thereby establishing constitutionally sufficient

minimum contacts with that state. No compelling circumstances make this otherwise appropriate exercise of personal jurisdiction unreasonable. The district court's assertion of specific personal jurisdiction over NANA was, therefore, proper. Consequently, I respectfully dissent.

2. Decision And Order Of The United States District Court For The Eastern District Of Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

Choon Young Chung,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No.
	)	84-50-A
	)	
NANA DEVELOPMENT CORPORATION,	)	
	)	
	)	
Defendant.	)	

ORDER

This matter comes before the Court on defendant's motion to dismiss this diversity suit on grounds of lack of personal jurisdiction and forum non conveniens. For reasons briefly set forth below, the Court DENIES defendant's motion.

Defendant argues that neither Virginia's long arm statute nor the federal constitution permit the court to exercise personal jurisdiction over it. Accepting plaintiff's allegations as true for the purposes of this motion to dismiss, the Court holds that the Virginia long arm statute permits assertion of jurisdiction because defendant contracted to supply "services or things" in Virginia. Va. Code Ann. Sec. 8.01-328.1(A)(2). The Virginia long arm statute is, moreover, intended to permit the exercise of jurisdiction to the maximum extent allowed by the federal

constitution. See Peanut Corp. v Hollywood Brands, Inc., 696 F.2d 311 (4th Cir. 1982) (citing Virginia cases). It would therefore seem that the long arm statute does not provide independant state law standards and that in interpreting the statute the Court must proceed directly to the constitutional analysis.

To satisfy federal due process, the defendant must have "minimumn contacts" with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. International Shoe Co., v. Washington, 326 U.S. 310 (1945). In assessing whether the defendant has the minimum contacts necessary to support personal jurisdiction, the court must focus on the relationship among the defendant, the forum, and the litigation. Shaffer v. Heitner, 433 U.S. 186, 204

(1977). The defendant's conduct and connection with the forum statute [sic] must be "such that he should reasonably anticipate being haled into court there." World-Wide Volkswagen Co., v. Woodson, 444 U.S. 286, 197 (1980). Where a corporation purposefully avails itself of the privilege of conducting activities within the forum state, it is not unreasonable to subject it to suit there if its allegedly defective merchandise has caused injury there. 444 U.S. at 297.

According to plaintiff's allegations, defendant purposefully availed itself of the privilege of conducting activities within Virginia. Although plaintiff originally travelled to Alaska to take delivery of the goods, defendant subsequently agreed to ship the goods into Virginia. Unlike the retailer in World-Wide Volkswagen who had reason to forsee that the goods he sold might, if

defective, cause injury in the forum state, the defendant here knew with substantial certainty that the goods, if defective, would cause injury in Virginia. In addition, defendant's contacts with Virginia are specifically related to this cause of action. On these facts, defendant should reasonably have anticipated being haled into court in Virginia. Plaintiff's allegations are sufficient to resist defendant's motion to dismiss.

In the alternative, defendant maintains that the suit must be dismissed or transferred on the grounds of forum non conveniens. The doctrine of forum non conveniens gives a court discretion to decline jurisdiction where the case can be more conveniently heard in another forum. Important considerations include the relative ease of access of proof, the availability of compulsory process in

obtaining the trial attendance of unwilling witnesses, and the convenience of witnesses in each forum. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947). The defendant bears the burden of persuading the court that the balance of convenience weighs heavily in favor of another forum. Schertenleib v. Traum, 589 F.2d 1156, 1160 (2d Cir. 1978). Defendant has not alleged facts that, if established, would satisfy the exacting burden placed on him.

Let the clerk send a copy of this order to all counsel of record.

Date: June 19, 1984

[signed]

Richard L. Williams

United States

District Judge

3. The Virginia Long-Arm Statute. Virginia Code (1984).

"Section 8.01-328.1. When personal jurisdiction over a person may be exercised. -- A. A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from a person's:

"1. Transacting any business in this Commonwealth;

"2. Contracting to supply services or things in this Commonwealth;

* * *

"3. Causing tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods consumed or services rendered, in this Commonwealth;

"4. Causing injury in this Commonwealth to any person by breach of warranty expressly or impliedly made in the sale of goods outside this Commonwealth when he might reasonably have expected such person to use, consume, or be affected by the goods in this Commonwealth, provided that he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this Commonwealth;"